

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 28, 1996

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pollack Industries, Inc. 133-8200
Case 7-CA-38114 177-1672
220-2587
220-5056
220-7533

This case was submitted for advice on the following issues:

- (1) whether a state court appointed receiver of a debtor employer is an agent or alter ego of, or a Burns successor to, the debtor employer;
- (2) whether a state court may preclude a receiver from dealing with the Union and, if not, whether the Board should intervene in the state court proceeding; and
- (3) [*FOIA Exemptions 2 and 5* .]

FACTS

Pollack Industries, Inc. ("Employer") is a company located in Wyandotte, Michigan. The Employer is signatory to a collective bargaining agreement with the United Paperworkers International Union ("Union"), which expires November 10, 1996.

On December 5, 1995,¹ a security guard for the Employer informed Union Business Agent Fred Norris ("Norris") by telephone that the City of Wyandotte had seized assets of the Employer for failure to pay back taxes. When Norris arrived at the Employer's premises, Norris was provided a copy of a memorandum dated December 5th informing the

¹ All dates hereafter refer to 1995, unless otherwise noted.

Employer's employees that they were laid off indefinitely for lack of work. The Employer never resumed operations.²

On December 8, Franklin Bank ("Franklin"), a creditor of the Employer, filed a complaint against the Employer and other related entities (collectively "Defendants")³ in the Circuit Court for the County of Oakland, Michigan, and moved for possession of personal property upon which it claimed a security interest. On December 12, Franklin filed an emergency ex parte petition requesting appointment of a receiver. On that same date, the court appointed Edward Pappas ("Pappas") as Receiver for the Defendants. Inter alia, the Receiver was specifically authorized to determine the responsibilities of employees, employ or terminate personnel, and to honor or terminate contracts (Para. 4(d), (e), (h)). The court's order specifically enjoined the Defendants, their officers, agents, servants, employees, and attorneys from encumbering assets, directing or supervising employees, or taking any action for or on behalf of or as agent for the Defendants without the approval of the Receiver. (Para. 5(a)-(c)) The court expressly reserved the right to modify its order. (Para. 11)

At some point near the imposition of the receivership, General Motors, a major customer of the Employer, removed its dies from the Employer's premises.

On December 15, Stuart Israel ("Israel"), the attorney for the Union, wrote Receiver Pappas requesting information relating to the displaced employees, amounts owed the employees, arbitration of outstanding grievances, and effects bargaining. The Union did not receive a response.

² Norris was also given the telephone number of a potential purchaser of the Employer, as well a copy of its application for an IRS employer identification number. Norris had heard several weeks earlier that the Employer was to be sold, but had been unsuccessful in obtaining any information from the potential purchaser about its intentions.

³ Franklin sued the Employer, Taurus Steel, Inc. and Eagle Group Ltd., which are Michigan corporations, as well as the Robert J. Pollack Living Trust and Robert J. Pollack, an individual.

On December 21, the court appointed Jerry M. Ellis ("Ellis") as substitute Receiver due to a conflict of interest on the part of Pappas. On that same date, Israel wrote Receiver Ellis requesting the same information he had requested of Receiver Pappas. The Union received no response to its inquiry. On January 11, 1996, Israel again wrote Receiver Ellis requesting information. The Union still did not receive a response from Receiver Ellis.

On January 31, 1996, the Union filed the instant unfair labor practice charge against both the Employer and Receiver Ellis, as Employer Representative. The charge alleged failure to provide relevant information, refusal to engage in effects bargaining, failure to process grievances, and unilateral changes to wages, benefits, and working conditions.⁴

On February 1, 1996, the court issued a new order providing for certain relief which was retroactive to December 21, 1995. The court's order set aside its December 12 order appointing Pappas as Receiver (except for paragraph 5 which enjoined the debtor employer and its agents, employees, etc. from acting without the Receiver's approval), as well as the court's December 21, 1995 order substituting Ellis as Receiver. (Paras. 1-3(A)) The court reappointed Ellis as Receiver as of December 21. (Para. 3(A)) It then ordered the Receiver to take control of the Employer's physical assets, and to arrange for their sale by public auction. (Para. 3(B)-(C)) However, the Receiver was expressly ordered not to operate the Employer's business "or deal with any of [its] employees or their benefit claims. . . ." (Para. 3(H)) The Employer, its officers, agents, servants, employees, and attorneys were enjoined from "selling, transferring, encumbering, concealing, offering, leasing or otherwise disposing of any assets of the [Employer]. . . ." (Para. 7)

On February 8, 1996, Receiver Ellis wrote Israel advising that the Receiver serves only in a limited capacity, has no information the Union seeks, and does not represent the Employer in negotiations.

⁴ At that time the Union had two previous unfair labor practice charges pending with the Board. Filed in September, 1995, one was deferred under Collyer Insulated Wire, 192 NLRB 837, 842 (1971), and the other was an ERISA deferral.

On February 26, 1996, the court issued an "Order Concerning Duties" of the Receiver in response to the Union's unfair labor practice charge naming Receiver Ellis as the Employer Representative. The order noted that "the Court did not appoint Jerry M. Ellis/Receiver to handle employment matters as set forth in paragraph 3(H) and other applicable sections of the February 1, 1996 Order of Appointment." (Order at 2, Recitals) It then ordered that Receiver Ellis:

[C]annot act as the Employer Representative regarding the Unfair Labor Practice Charge filed by the subject union. . . . [He] is only obligated to provide such documentation to the unions as may be requested by a proper subpoena after it has been served on him. . . . [He] has no authority to bargain with the union over the effects of the alleged plant closing and cessation of operations. . . . [And he] has no authority to deal with the unions concerning the processing of grievances through the grievances and/or arbitration procedure. . . . [or] concerning alleged unilateral changes in wages; benefits and working conditions.
(Paras. 1-5, at 2-3)

ACTION

The Region should dismiss the Union's charge against the Receiver, absent withdrawal and issue complaint against the Employer.

It is unclear under extant Board law whether it is appropriate to hold a liquidating receiver or trustee liable for violations of the Act.⁵

⁵ See Cone-Heiden Corp., 305 NLRB 1045, 1045 (1991) (Board held that neither state court receiver, nor its agent which managed the debtor employer's business, were an agent of the debtor employer it operated because the receiver is a fiduciary of the creditors); San Bernadino Dental Group, 302 NLRB 135, 136 (1991) (Chapter 7 trustee not a statutory employer because it was not authorized to operate the debtor employer's business); Blazer Indus., Inc., 236 NLRB 103, 103 n.1 (1978) (state court receiver which did not operate the debtor employer's business held not to be alter ego of debtor employer); see also Kanowsky Furniture, Inc., 314 NLRB 107, 110 (1994) (ALJ cited San Bernadino for proposition that "a Chapter 7 bankruptcy trustee is not an

In any event, it is unnecessary to name the Receiver since the same remedy, Transmarine backpay,⁶ is available whether or not the Receiver is named. Should the parties engage in effects bargaining and agree to a settlement in excess of the Transmarine remedy, an additional proof of claim can then be filed with the court.

[FOIA Exemptions 2 and 5

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employer within the meaning of Section 2(2) of the Act and therefore not an alter ego of the prebankruptcy entity"); Western Paper Prods., Inc., 313 NLRB 94, 94 (1993) (Board stated that it "will not find a receiver appointed under state law to be an agent of the business entity it is managing," citing Cone-Heiden).

Cf. Ohio Container Serv., Inc., 277 NLRB 305, 306 (1985) (Board directed Chapter 7 trustee to affirmatively remedy noncontractual violations of Sections 8(a)(1) and (3) of Act by debtor employer); see also Edward C. Hostmann (Risberg Truck Lines), 319 NLRB No. 122, 1995 WL 732847 at 3 (Dec. 8, 1995) (Chapter 7 bankruptcy trustee named as respondent and, in summary judgment action, ordered to remedy unfair labor practices); Appelbaum Indus., Inc., 294 NLRB 981, 981 n.2 (1989) (Board held that "regardless of the term used to describe his status, a trustee in bankruptcy may nevertheless be directed by the Board to take remedial action"); Nathan Yorke, 269 NLRB 819, 820 (1981) (Board ordered bankruptcy trustee that shut down operations upon conversion from Chapter 11 to Chapter 7 to bargain over effects), enf'd in pertinent part, 709 F.2d 1138 (7th Cir. 1983), cert. denied, 465 U.S. 1023 (1984).

⁶ The Board may file a proof of claim for two weeks' backpay pursuant to Transmarine Navigation Corp., 170 NLRB 389 (1968).

⁷ NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

⁸ [FOIA Exemptions 2 and 5

For these reasons, the Regional Office should dismiss the charge against the Receiver, absent withdrawal.

B.J.K.